

1 Pages 1 - 33

2 UNITED STATES DISTRICT COURT

3 NORTHERN DISTRICT OF CALIFORNIA

4 Before The Honorable Sallie Kim, Magistrate Judge

5 UNITED STATES OF AMERICA, ) No. 3:15-mj-70856-WHO-1(SK)

6 Plaintiff, )

7 v. )

8 ADAM SHAFI )

9 Defendant. )

10 San Francisco, California  
Tuesday, December 22, 2015

11 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL  
12 ELECTRONIC SOUND RECORDING - FTR 2:10-2:48; 2:57-3:01

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1 TUESDAY, DECEMBER 22, 2015

2:10 P.M.

## 2 PROCEEDINGS

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4 THE CLERK: Calling criminal matter 15-582, the  
5 United States versus Adam Shafi.6 THE COURT: In the audience, you cannot communicate with  
7 the defendant. I just want to warn you now. The court  
8 security officer should have told you that, but I just want to  
9 let you know again. It's just disruptive; it's distracting.  
10 Okay? No waving; no talking. Okay?11 MS. KELLY: Good afternoon, Your Honor, Candace Kelly on  
12 behalf of the United States.

13 THE COURT: Good afternoon.

14 MR. DRATEL: Good afternoon, Your Honor, Joshua Dratel,  
15 Erik Levin for Mr. Shafi, who's standing beside us.

16 THE COURT: Thank you.

17 So I understand that we're on for a motion for release  
18 from detention. And first I will hear from the government and  
19 then I'll hear from defense counsel.20 MS. KELLY: Your Honor, this is a presumption case and it  
21 is a presumption case which means that the presumption is for  
22 detention because it involves a crime involving terrorism.23 And in this case it's material support of terrorism. And  
24 there are many ways to commit material support of terrorism.  
25 It could be sending funds; it could be sending equipment.

1           In this case, it's someone who is trying to -- was trying  
2           to commit himself to the cause of Al-Nusrah Front.

3           And I think that it's important -- and I regret that I  
4           did not include this in my papers -- to make sure it's clear  
5           what Al-Nusrah Front is, which is, it is a designated terrorist  
6           organization by the state department.

7           I think in this culture right now in this country there's  
8           a lot of understanding of ISIS or ISIL and -- because they're  
9           in the news more often. But I think it's very important to be  
10           clear that Al-Nusrah Front is al-Qaeda's affiliate in Syria.

11           And that was determined by al-Zawahiri, who is the  
12           leader, emir of al-Quada, who designated Julani, who is the  
13           emir of Al-Nusrah Front. And as the Court may recall from the  
14           papers, Julani is the emir whose two-hour interview the  
15           defendant was listening to before he had a conversation with  
16           his friend, S.K., about how he loved that emir and how he  
17           believed in the emir's cause and his approach to jihad and  
18           his --

19           And through the course of that, and using the defendant's  
20           understanding -- as opposed to the government's understanding  
21           of that organization, it's an organization that believes that  
22           America is the enemy, and they are committed to creating a  
23           place where it is ruled by Allah's rule and nothing else, and  
24           that America is the enemy and they are --

25           As opposed to, as the defendant was very -- clearly had

1       studied this and was understanding the difference between ISIS  
2       and Al-Nusrah Front through his conversation, ISIS -- which, by  
3       the way, al-Zawahiri, who is the emir of al-Quada, ordered ISIS  
4       to leave Syria and go back to Iraq because he had designated  
5       Al-Nusrah Front as the affiliate of al-Quada in Syria.

6           That they do -- ISIS does have a more violent approach to  
7       the same cause, which is America is the enemy and they're  
8       fighting against that, and America -- Americans are all  
9       infidels.

10          So I think it's important -- I pulled a couple of things  
11       that government officials have said about Al-Nusrah Front in  
12       terms of just making sure that it's clear that just because  
13       ISIS is more popular in the media and may have more violence  
14       that's a more violent approach, Al-Nusrah Front is just a more  
15       selective approach.

16          Just in the year -- because this was the fact that I was  
17       able to pull from government sources -- the year 2011 to 2012,  
18       Al-Nusrah Front had claimed responsibility for nearly 600  
19       attacks. And those included suicide attacks, small arms  
20       attacks, IED attacks. And just this year the director of the  
21       National Counterterrorism Center was testifying before the  
22       Senate Select Committee on Intelligence and he said that  
23       Al-Nusrah Front was one of the most capable groups within Syria  
24       and has mounted suicide, explosive, and firearms attacks  
25       against regime and security targets across the country. It has

1       also sought to provide limited public service and governments  
2       to the local population and areas under its control.

3           So just as -- just to sort of set the stage in terms of  
4       why this is a preponderance -- why this is a presumption case  
5       and what Al-Nusrah Front is really all about, I wanted to make  
6       sure that was on the record.

7           The government's position with respect to Mr. Shafi is  
8       that there is far more than a preponderance of evidence --  
9       which is the standard -- for risk of flight. This is not a  
10       situation where there's really a lot of doubt. Because this  
11       would be -- there's already been a dry run.

12           This family, who clearly understands the gravity of the  
13       situation, given the facts of what's going on in Syria, if they  
14       were fearing that their son was going to join a terrorism  
15       group, which is what his father said to the U.S. Embassy  
16       officials back in August of 2014 when he slipped away from  
17       their family vacation, he went in immediately and said, "I am  
18       afraid that he is being recruited, that he may be doing harm to  
19       himself or others. We need to find him quickly." That is a  
20       reaction of a father who is fearing for his son's safety,  
21       whether it's at his own hands or at the hands of others, if  
22       you're going into this situation in Turkey or Syria, which is a  
23       violent, very dangerous situation.

24           So his father -- who clearly knew that this was not  
25       someone who was just tired of living with his family, he went

1 to the embassy. And he had serious concerns because he knew  
2 what he was dealing with. It's a father who had said that he  
3 is very protective of his children. He told the FBI that -- in  
4 August of 2014, or September, when he was interviewed, that  
5 every family member had a GPS tracking app on their phone so  
6 they knew where they were at all times.

7 Which I think comes into play this year, when he went  
8 to -- when his son went to the airport again.

9 So this is a family that knows, this is a father who  
10 encouraged his son to go -- this is after he came back from the  
11 first trip -- he encouraged him to go and visit a defendant who  
12 was detained down in San Jose, Mr. Harcevic, who defense  
13 counsel raised in his papers, because clearly he wanted him to  
14 understand the consequences of engaging in this activity, which  
15 is trying to go and join one of these groups.

16 Mr. Harcevic was incarcerated for the very same thing:  
17 Material support -- not attempted, but he was charged with  
18 material support by sending funds to a terrorist organization.

19 And the father, who was working with the FBI and talking  
20 with the FBI over the months, said, "I'm not sure it did any  
21 good."

22 So here's someone who has tried. He has tried to help  
23 him get education; he has tried to help him with employment.  
24 His father has his own company. I think his uncle also has a  
25 company. They try. And they have a very strong -- it's very

1 clear they have a very strong network of the community and  
2 friends and family members. They weren't able to stop this.

3 And this is something that is driven not by -- you know,  
4 we've seen a bunch of defendants charged with drug crimes  
5 today. They have a very different motivation for the crimes  
6 that they commit. And the amount of sureties and the amount of  
7 money and their ties to the community are very important and  
8 can be overcome by certain conditions that the Court can set.

9 We are dealing with someone who, if the Court has had a  
10 opportunity to listen to his discussions about Julani, the emir  
11 of Al-Nusrah Front, this is someone who is very committed, to  
12 the point of saying he is content to die with them.

13 So leaving his family and perhaps having them lose their  
14 house is not really going to change; it's not really changing  
15 the circumstances that the family and he were faced with after  
16 he came back in August of 2014.

17 So the circumstances are pretty much the same, less, of  
18 course, at this point the FBI does not have the resources that  
19 they have been expending on this case up until charging.

20 So, you know, obviously there are interceptive phone  
21 calls that are in papers. That's a pretty intrusive technique  
22 that the FBI had at its disposal, which obviously, as a charged  
23 defendant, they don't have that anymore.

24 Not to mention that I think that release is not something  
25 that should be ended up being a burden on the FBI to keep the

1       community safe and to protect the national security. That's  
2       why they brought these charges to bear.

3           So I think that both through Mr. Shafi's words -- even if  
4       the Court were to disregard the reason that he was leaving and  
5       separate that from the question of his risk of flight, he wants  
6       to leave the United States.

7           He told the FBI that -- when he was talking to them on  
8       the -- at the airport on June 30th of this year, he didn't  
9       admit where he was going to go, but his story, at the time,  
10       was, "Oh, I want to leave. I don't want to be in the  
11       United States anymore. I don't believe in the --

12           You know, he cited the gay marriage ruling that had just  
13       come down. He didn't want to live in the United States. This  
14       is someone who does not want to be living amongst -- as he  
15       calls us, the kafir, the American infidels. He wants to live  
16       elsewhere.

17           And even if he were to -- so you can even separate the  
18       fact that he was going to a terrorist organization in terms of  
19       looking at the risk of flight. This is someone who knows his  
20       parents are keeping a very careful watchful eye on him, have a  
21       GPS on him. He lied to them and told them that he was going to  
22       an interview at San Francisco State University when, in fact,  
23       he was going to the airport.

24           And once again, if there's any doubt about whether or not  
25       the parents were fully aware of his motivation and the

1 seriousness of the threat that he would leave the country to go  
2 join a terrorist organization, somehow they knew -- even though  
3 he had lied to them and told them he was going to an interview,  
4 they knew that he was going to the airport.

5 They called his friend, which is evidenced by the phone  
6 call with his friend after the -- after he left the airport,  
7 who said, "Oh, yeah, your parents called; they think you left."

8 They talked to a relative, also in the complaint  
9 affidavit. And not only did they do that -- the agents  
10 informed me that they had called the airport, they had called  
11 Mr. Shafi, who was not responding to their calls, he was being  
12 paged at SF0.

13 And their choice of trying to deal with this very serious  
14 situation where I can only imagine that they feared that their  
15 son was going off to do something where he very well may get  
16 killed, was to call relatives in Egypt and ask them to go to  
17 Istanbul and try to beat his flight so that they could  
18 hopefully find him in the airport and stop him from leaving.

19 Now, that not only shows the way that they're dealing  
20 with this very serious situation, it also shows an incredibly  
21 strong tie to those family members in Egypt, that they believed  
22 that they could call someone in Egypt, family members.

23 And granted, they're all -- the parents and uncles are  
24 all dual US and Egyptian citizens. If they believed that the  
25 family members in Egypt were going to get on a plane and try to

1 stop this young man in Istanbul, that's a pretty serious,  
2 strong connection to a foreign country that Mr. Shafi has.

3 Not to mention in the pretrial services report they  
4 have -- this family has their own condo in Egypt.

5 So I think there's plenty of opportunities for him to  
6 flee and plenty of motivation for him to flee.

7 He has said that, you know, "What am I going to do now?  
8 Maybe I should just go to jail," when he was talking to his  
9 relative after -- after he was stopped.

10 And in his view, you know, he had been -- this was -- he  
11 had received a sign from Allah that he should go. The sign was  
12 if he found his passport, he was going to go. And he found his  
13 passport, his U.S. passport, and then apparently being stopped,  
14 or having the FBI talk to him -- which he voluntarily talked to  
15 them -- was evidently another sign that he wasn't going to go.

16 So how is he to join this fight? How is he to support  
17 this cause that he believes so strongly in this cause? There  
18 are lots of ways, and we've seen it in other cases. There are  
19 many ways to support these causes without traveling.

20 So it's either travel to join them or do something  
21 else. And that's an unpredictable threat, that there's no way  
22 that this family, despite clearly they have every intention of  
23 trying to do the right thing, I mean, separate and apart from  
24 not calling law enforcement when they think their son is  
25 leaving and taking that responsibility into their own hands,

1       but they simply have demonstrated that they are not capable of  
2       countering this really strong belief system.

3           So this is not about money. It's not about greed. It is  
4       about a belief system, and it is about the fact that everyone  
5       around him, Mr. Shafi, here in this country, is --

6           And by the way, there is a quote in the complaint that  
7       says, "What am I going to do, live like everyone else here and  
8       betray --

9           And it says unintelligible, but having listened to the  
10       calls again it's betray "Muslims."

11           So that's how he feels about living in this country.

12           So there are not a lot of cases that come before this  
13       Court where the motivation for the crime itself is to leave the  
14       United States.

15           So what can be -- and, that, you know, he certainly has  
16       not shown any respect for material wealth, which is very much  
17       an American -- it's sort of quintessential America; right? --  
18       is wealth and -- material wealth and houses.

19           So a number of people posting their houses may make them  
20       more motivated to do what they can, but I don't think there's  
21       any greater motivation than trying to stop your son from going  
22       somewhere where you think he's going to die.

23           So posting -- they can post all of their many properties  
24       and their rental properties and their Egyptian property. I  
25       don't think you could find a way to have his parents have a

1       higher motivation than they had.

2           And he certainly has shown that he doesn't have any  
3           respect for law enforcement here, for the rules, and, most  
4           importantly, for the American way of life.

5           So based on all of those things, I think he is both a  
6           flight risk and a danger to the community. Because if, for  
7           some reason, he feels that all of the conditions that might be  
8           imposed were to thwart his efforts to leave, although he has  
9           talked about leaving through Mexico, or going through Egypt,  
10           which is "hell-a disorganized," I think is -- to quote -- his  
11           words, there are a lot of ways to get out of this country  
12           without getting on a plane and without having a passport.

13           So with the right motivation, which I think this young  
14           man has, I fear that there is either -- we're going to create a  
15           dangerous situation by thwarting that and forcing him to live  
16           amongst the kafir and betray Muslims, or we're going to create  
17           such a huge incentive to carry out his ultimate plan, which is  
18           to get to Al-Nusrah Front and join the fight, I don't think  
19           that any of the conditions that have been proposed are  
20           sufficient to counter those.

21           **THE COURT:** Thank you, Ms. Kelly.

22           Mr. Dratel?

23           **MR. DRATEL:** Thank you, Your Honor.

24           I know the Court has read the submission, so I'm not  
25           going to --

1                   **THE COURT:** I've read everything.

2                   **MR. DRATEL:** Yes.

3                   **THE COURT:** And I've listened to the tapes as well.

4                   **MR. DRATEL:** Right. And I understand that, Your Honor.

5                   So what I'm going to do is address -- and if I repeat anything  
6                   in there, it's really in the context of papers that were not  
7                   addressed in our papers.

8                   **THE COURT:** Okay.

9                   **MR. DRATEL:** In other words, the government's papers,  
10                   pretrial services report, and the supplemental papers that we  
11                   filed yesterday.

12                   And just as a threshold matter, the statutory framework  
13                   and case law deciding it -- interpreting it, the facts of the  
14                   case are probably the least important in terms of presumption  
15                   of innocence and not trying the case right now when we are just  
16                   getting in the case and the government's had, essentially, more  
17                   than a year of investigation involving this case.

18                   So -- but I will discuss those things as they implicate  
19                   the important issues and the issues that the Court obviously  
20                   has to address, which is risk of flight --

21                   **THE COURT:** Mm-hm.

22                   **MR. DRATEL:** -- and danger to the community.

23                   So with respect to the pretrial services report, to get  
24                   to that first, the pretrial services report concludes that  
25                   there are conditions that could resolve the issue of risk of

1 flight.

2 And we agree, obviously -- and just so that we're clear  
3 on a couple of things that the government said today, the  
4 intervention by family in Egypt proves the exact opposite:  
5 That he does not have refugee agent to avoid this case. They  
6 are fully aligned with the family here in the United States to  
7 keep him here. So that's not a solution. So it proves the  
8 exact opposite than what it government would claim it does.

9 Second, with respect to the pretrial services position on  
10 dangerousness, which is that there are conditions, but they  
11 feel that there are mental health issues, potentially, that  
12 they want evaluated and then want -- prior to addressing it on  
13 the merits.

14 And I think that that's a little backward in the sense of  
15 how bail works. First of all, the statute, 3142(c)(1)(B)(x) --  
16 10 -- one of the conditions is mental health counseling as a  
17 condition of bail. The Court can order that as a condition of  
18 release. And we encourage the Court to do that. If that's --  
19 and the other part is if the mental health issue is the only  
20 thing that's an impediment to a conclusion that there are  
21 conditions, not only that will not only resolve risk of flight  
22 but also dangerousness to the community. And if that's an  
23 impediment to release, then order release pending that  
24 evaluation, not order detention pending that evaluation. Set  
25 the conditions of release.

1           We don't think it's necessary, based on the nature of the  
2       statute and all the other factors that we'll go through, but it  
3       really is the opposite. You should be ordering release pending  
4       that evaluation. We think the evaluation will come after, as a  
5       component of the pretrial release.

6           The other part of the aspect of the mental health  
7       equation is that the dangerousness aspect of this requires  
8       clear and convincing evidence. And that one paragraph of the  
9       interview with Mr. Shafi is not clear and convincing evidence  
10       of anything. That he considered suicide once or twice or  
11       occasionally, he never had a plan to do it, never attempted it.  
12       It's not evidence. It's not clear and convincing evidence.

13           Not only that, it's contradicted by all of the other  
14       evidence. This is someone without any violence in his history.  
15       Literally, he would not hurt a fly. You've read the letters,  
16       that cousins say -- friends say, "That's your cousin who  
17       wouldn't let us kill the bee. He didn't want to dissect an  
18       insect in class. He was allowed to take photographs instead."

19           So in terms of context of dangerousness, the government  
20       had him under surveillance from the time he returned. He  
21       submitted to interviews. He cooperated. He doesn't have a  
22       criminal record.

23           So all of these factors have not evidenced a single  
24       violent incident, violent plan, or anything like that.

25           Even as to the airport. Even at the airport. They said

1 he was arrested without incident at his home.

2 THE COURT: Mr. Dratel, would you like to discuss the  
3 comments that were made in the tape-recordings? Because I did  
4 listen to them, and I'm assuming that you listened to them as  
5 well.

6 MR. DRATEL: Oh, yeah, I have.

7 THE COURT: There were some discussions about violence in  
8 the tape-recordings. Killing people. Gallons of blood. It's  
9 very disturbing.

10 MR. DRATEL: Well, you know, some of this stuff, which  
11 is -- in terms of blood and all that, I think is about -- you  
12 know, there are certain -- there are certain rhetoric.

13 First of all, this country has elevated the concept of  
14 violent rhetoric to presidential campaigns. And to use that as  
15 a basis for denying bail I think would not be appropriate under  
16 the statute or the Unruh standard. People always talk about  
17 things that they are never going to do. And they may say,  
18 under conditions of anger or frustration, all sorts of things.

19 But it's what they do, if it's violent, that counts. And  
20 I don't think there's a single person who's come into court in  
21 any context and been either convicted or punished because of  
22 what they say.

23 And so in the context --

24 THE COURT: I don't actually think that's accurate,  
25 Mr. Dratel. I think there are some situations in which people

1 can be criminally convicted for comments. For example, threats  
2 can be -- constitute criminal conduct, so.

3 **MR. DRATEL:** But we don't have those kinds of threats  
4 here. Those are very specific threats against very specific  
5 people and we don't have those here.

6 **THE COURT:** I'm concerned about the threats here and the  
7 tape-recordings that I heard.

8 **MR. DRATEL:** Well, Your Honor, first of all, some of the  
9 language, rhetorical, is religious language. And there's an  
10 article that came out very recently, so which -- they  
11 interviewed people, and they gave them verses, scriptural  
12 verses that have violence in them, and almost everyone thought  
13 they were from the Koran. They were all from the Bible.

14 **THE COURT:** There are definitely people who believe the  
15 Bible who also are violent.

16 **MR. DRATEL:** No, no, that's not what I'm talking about.

17 **THE COURT:** I'm not saying it's because of the Koran.

18 **MR. DRATEL:** Religious rhetoric, which is what a lot of  
19 these things are -- we talk about spilling blood and all that.  
20 It's all religious rhetoric, which doesn't necessarily  
21 translate to actual conduct. And it hasn't translated to  
22 actual conduct.

23 (Indiscernible) on the tapes when they said -- when he  
24 says -- I mean, when he says "Even if I were to do that, even  
25 if that was my intention," why is that not dispositive? Why,

1       when he says, "Why would they think that? It doesn't make  
2       sense." Why is that not dispositive?

3           You can't parse it out in a way that makes it one or the  
4       other. The tapes are ambiguous; there's a lot of ambivalence;  
5       there's a lot of going back and forth.

6           They said -- there's cases say he didn't go to Al-Nusrah  
7       Front, even in Turkey, they're claiming. The government's  
8       claiming that's what it means. So how is that not a more  
9       powerful indication?

10           Also, in terms of threats, there is no violence. The  
11       government left him alone for all this time. The government  
12       had these conversation. They listened to them in real time.  
13       This is an intelligence wire tape. This is not -- they're all  
14       in English. This is an intelligence wiretap. They listen to  
15       them ongoing.

16           The government, at 4:00 o'clock that day, knows he's  
17       going to be on a plane. They don't go until the passenger  
18       says, "Oh, because -- you know, he's acting funny." That's  
19       when the FBI shows up.

20           So the government itself didn't see danger in any of  
21       these comments. They did not act. That is the ultimate proof  
22       that they are not to be seen as a clear and convincing evidence  
23       of danger. Because all the government needed was probable  
24       cause. And they couldn't even get that far, based on all of  
25       those statements in all of the tapes.

1           Again, also the court is full of family and friends. In  
2 terms of -- and particularly in the context of risk of danger  
3 and even risk of flight, it goes to both of these, you know.

4           And also, also, the other -- the other part of this is  
5 we've had six months of a very controlled experiment as to what  
6 he is like. There's not a single incident in jail.

7           And that raises another issue, which is really, to me,  
8 outrageous. That all of a sudden, when this case now becomes  
9 public and we have a bail hearing, he's in solitary  
10 confinement, brought in in shackles, which I think is  
11 outrageous --

12           **THE COURT:** So, Mr. Dratel, just to let you know, the  
13 conditions of confinement are separate from the bail  
14 consideration. So I'm trying to keep focused on risk of flight  
15 and danger to the community.

16           I understand your outrage about that, but I'm going to  
17 try to put that aside.

18           I can guess, I can guess -- I thought about that.  
19 Because I realized how upset, you know, Mr. Shafi and his  
20 family probably were when that happened.

21           My guess, without any other information, is that once the  
22 information became public, the correctional officials  
23 probably --

24           **MR. DRATEL:** No.

25           **THE COURT:** -- wanted to separate him out --

1                   **MR. DRATEL:** No.

2                   **THE COURT:** -- for his own safety.

3                   **MR. DRATEL:** No, they didn't, Your Honor.

4                   **THE COURT:** That's my guess.

5                   **MR. DRATEL:** They didn't.

6                   **THE COURT:** Okay.

7                   **MR. DRATEL:** I'll tell you why. For two reasons. One is  
8                   they asked him, and he said no.

9                   **THE COURT:** It's not up to him.

10                  **MR. DRATEL:** But I can give you the second part too, the  
11                  second part too.

12                  There was an incident involving something public about  
13                  terrorism months ago, while he was already in. They took him  
14                  for a day. Didn't change his uniform, didn't shackle him.  
15                  That was protective custody.

16                  This is not protective custody. This is onerous.

17                  **THE COURT:** Oh, no. I'm talking about when the complaint  
18                  wasn't sealed and the press got wind of this and it was  
19                  actually in the local papers. That timing seemed to coincide  
20                  with Mr. Shafi's placement into solitary confinement.

21                  That's my guess. I could be wrong.

22                  **MR. DRATEL:** That isn't a basis for it. And they did it  
23                  before when there was a situation where they thought there  
24                  might be danger to him. They put him in protective custody for  
25                  a day.

1           But also, for the reason that it's relevant to bail, is  
2           that it's impossible to prepare a case with someone in solitary  
3           confinement. I've done it too often. It is not possible.  
4           They took his legal papers. This is something where he's going  
5           to be at the mercy of the most arbitrary and capricious  
6           authority that is going to interfere demonstrably with three  
7           things: Our ability to get to see him on a regular basis in a  
8           way that makes sense; second is his ability to independently  
9           review everything and prepare; and third is the affects of  
10           solitary confinement are demonstrably deleterious to everyone  
11           who goes through it.

12           We put in a lot of the literature, and it's -- it's  
13           incontrovertible.

14           And what you have is someone who doesn't deserve to be  
15           there, who's going to be there -- really should be out on bail.  
16           That's what I'm saying. It's going to interfere -- it's going  
17           to continue to interfere with our ability to prepare the case.

18           So I think it is relevant in the sense that that's what  
19           the solution is going to be for the government to try to make  
20           the case more difficult. I think the solution for a case where  
21           even pretrial says there are conditions, then I think there are  
22           conditions. And certainly there are -- the issue that we're  
23           facing is really not about whether there are conditions, it's  
24           whether there are no conditions that would assure the Court.

25           So it's really reversed. And it's still the

1 (indiscernible), it a presumption case. It's still the  
2 government's burden.

3 So in the context of --

4 MS. KELLY: Your Honor, I'm sorry to interrupt, but I  
5 actually -- if the Court is interested, I can, just on the  
6 question of the --

7 THE COURT: The solitary confinement.

8 MS. KELLY: -- the solitary confinement, I do have --

9 THE COURT: Please.

10 MS. KELLY: -- information on that.

11 THE COURT: Please.

12 MS. KELLY: Which is that the case agent who is not in  
13 court today, another agent on the case, is here, was contacted  
14 by the prison -- Glenn Dyer, and they informed the case agent  
15 that they had, on their own -- and they have every -- you know,  
16 right and reason to -- they had done a search of Mr. Shafi's  
17 cell when he was out of the cell. They had found papers that  
18 they thought were of concern. They called the national  
19 security expert, the agent, and during that conversation they  
20 told the agent that when the case became public there were  
21 people -- there were other inmates on the floor who had made  
22 comments.

23 And one that I remember that was repeated to me -- and  
24 again, this is from the Glenn Dyer deputy to the case agent to  
25 me, so if something's lost -- but the comment was, "Not all

1       federal prisoners are patriots."

2           And based on that comment -- and Glenn Dyer, as you know,  
3           is a local facility which has some federal prisoners -- they  
4           thought -- they decided to put him in administrative  
5           segregation for his own safety.

6           And that is my understanding of how that happened.

7           And I don't know -- it is not up to me and it is not up  
8           to the FBI as to how long that lasts. But that's just to  
9           clarify what the circumstances were that led to those events.

10          **THE COURT:** And just so I can understand, there's no such  
11           thing as solitary confinement at Glenn Dyer; it's just  
12           administrative segregation. I've been there. I've actually  
13           physically toured the facility and I understand what the  
14           different levels of security are.

15          So I think the term "solitary confinement" is incorrect.  
16          I think administrative segregation, for a number of reasons,  
17           people who are kept at Glenn Dyer jail are separated out into  
18           administrative segregation, sometimes for their safety,  
19           sometimes for other reasons.

20          I do understand that if it's a problem in having --  
21           presenting a criminal defense, that you can come back to me and  
22           we can talk about it. Because I don't want that to happen in  
23           any way, shape, or form.

24          But I think the term "solitary confinement" is probably a  
25           misnomer in this situation.

1                   So I wasn't sure where Mr. Shafi was being held, but if  
2                   it's Glenn Dyer I am familiar with that facility and I  
3                   understand what the administrative segregation is. It's  
4                   different. It's different.

5                   **MR. DRATEL:** Well, also, Your Honor, probably the greater  
6                   violation is the search of his cell, the reading of his  
7                   privileged papers, and then sharing it with case agents.

8                   We'll get to that at a different time. That's not for  
9                   today.

10                  **THE COURT:** Okay. So can I ask -- Ms. Kelly, can I ask  
11                  you a question about the tape-recordings? The people who  
12                  Mr. Shafi is recorded talking to are not identified in the  
13                  tape-recording.

14                  **MR. DRATEL:** Right.

15                  **THE COURT:** Is that public information or is that sealed  
16                  information.

17                  **MS. KELLY:** At this time, Your Honor, they are only  
18                  identified in the complaint affidavit -- in the public record.  
19                  They are only identified as -- by their initials, S.K. and A.N.

20                  **THE COURT:** Okay. And Mr. Dratel, let me ask you a  
21                  question. Have the sureties heard the tape-recordings?

22                  **MR. DRATEL:** They are familiar with what's in the  
23                  complaint. The tape-recordings were under a protective order  
24                  until very recently. But if you wanted them to listen to them,  
25                  they could listen to them.

1                   **THE COURT:** I just wanted to see if they had.

2                   **MR. DRATEL:** It's really not about that. It's really  
3                   about what are the conditions that will assure that the Court's  
4                   concerns will be met and --

5                   **THE COURT:** Let me tell you what one of my concerns is.  
6                   It appears from the tape-recordings that there are other people  
7                   that Mr. Shafi is close to, perhaps even related to, very close  
8                   to. If he's released, those people who expressed the same  
9                   belief system that he did about leaving this country and  
10                   joining ANF, I don't know how to identify them and keep them  
11                   away from Mr. Shafi.

12                   And that's actually one of my biggest concerns, from  
13                   listening to the tapes, is that there seem to be several people  
14                   who shared the same belief system. I don't know if they're  
15                   still around; I don't know who they are.

16                   **MR. DRATEL:** Two of them are not family members, so that  
17                   is an issue that --

18                   **THE COURT:** But one of them is.

19                   **MR. DRATEL:** -- we're not going to have to worry about.  
20                   I understand. But also, the point is that he is going to  
21                   be -- if the Court were to impose these conditions, under home  
22                   confinement we could have a chaperon, an adult chaperon. The  
23                   family is willing to commit full time, either Mr. Shafi or  
24                   Mrs. Shafi. His father and his mother will be there every  
25                   minute of the day, every second with him.

1           And, you know, the government making that the family was  
2        in -- we're not asking that the family is. Pretrial services  
3        is. This is something that we do all the time. We don't leave  
4        people in the custody of their families if we want to impose  
5        strict conditions. Those home confinement, electronic  
6        monitoring, Internet access restrictions, strict reporting by  
7        telephone, custodianship, those are all elements that are done  
8        by the court, not by the family.

9           Nobody's asking the family to be the ultimate  
10        responsibility. The responsibility is the system to impose  
11        those conditions. I think they're all available.

12           **THE COURT:** I think my concern -- I think my concern is  
13        that there are other people living in the home --

14           **MR. DRATEL:** We'll resolve that, Your Honor.

15           **THE COURT:** -- that he would be living --

16           **MR. DRATEL:** I prefer --

17           Your Honor, there are reasons why it's hard to do that on  
18        the public record. And it has to do with --

19           **THE COURT:** Would you like to seal the courtroom and have  
20        a more candid discussion?

21           **MR. DRATEL:** If --

22           **THE COURT:** Ms. Kelly, how do you feel about that?

23           **MS. KELLY:** With respect to this one individual, I think  
24        that at this point the case is unsealed and the public has a  
25        right to know.

1           And I think that the other thing is, as the Court has  
2           pointed out, there are, you know, numerous letters which were  
3           all written before anyone could even have read the complaint.  
4           And certainly the sureties perhaps, between last Thursday when  
5           the complaint was unsealed and their interview with pretrial,  
6           have been able to see it.

7           But they're all very close, you know. They're uncles and  
8           aunts. So I think that it is very important that this case  
9           remain public.

10           At the same time, the government, for the same reason  
11           that we used vague terms as "relative" and initials, the  
12           Court -- the government has a concern about the safety, and I  
13           don't think it's appropriate to name those individuals.

14           **THE COURT:** Mm-hm. And is defense counsel aware of the  
15           identities or --

16           **MR. DRATEL:** Yes.

17           **THE COURT:** Okay.

18           **MR. DRATEL:** But also, Your Honor, I had a technical  
19           issue with it, which apparently is not the case, so I just  
20           resolved that. So.

21           **THE COURT:** Okay.

22           **MR. DRATEL:** But if the Court -- I mean, it's a -- if the  
23           Court wants that family member to live somewhere else, we'll do  
24           that. There are other family members, there are aunts, uncles,  
25           cousins. That can be done. That can all be -- I mean, this is

1       a -- as the prosecutor laid out, this is a family that wants  
2       this to work. They're willing to do anything. And the Court  
3       can impose almost anything.

4           **THE COURT:** Okay. So this is what I'm going to do. I'm  
5       going to take a short break for ten minutes and I'll come back  
6       and the court will be in recess and then we'll come back and  
7       I'll (indiscernible.)

8           **MR. DRATEL:** Thank you.

9           **THE COURT:** Thank you.

10          **MR. DRATEL:** Your Honor, may I just add one thing -- I  
11       apologize --

12          **THE COURT:** Yes.

13          **MR. DRATEL:** -- with respect to something in the  
14       government's papers that I didn't get a chance to address,  
15       which is the issue of the case in Missouri, the Harcevic case?

16          **THE COURT:** Mm-hm.

17          **MR. DRATEL:** The Harcevic situation is an example of  
18       working. He's out on bond, home confinement, it's all working.  
19       The other defendant --

20          **THE COURT:** Just so I understand, the government said  
21       that he had not tried to actually leave the country to join any  
22       groups.

23          **MR. DRATEL:** He sent money for a violent act.

24          **THE COURT:** He physically did not try to leave the  
25       country.

1                   **MR. DRATEL:** Right. But I don't know that it was a --  
2                   that the issue is just risk of flight. Because risk of flight,  
3                   pretrial services says, should not be an issue here. I think  
4                   there are conditions that will resolve it.

5                   **THE COURT:** I think pretrial services, as I read it, said  
6                   there was a risk of flight and they were concerned.

7                   **MR. DRATEL:** Well, it says -- it says although pretrial  
8                   services believes that a combination of conditions may possibly  
9                   be fashioned and it talks about mental health. So.

10                  But the other part is that the person who the government  
11                  raises, Rosage [phonetic], in that case, had -- you know, the  
12                  reason for denying bail in that case were quite different in  
13                  that he had been -- he had prior assault arrest, he had been  
14                  sentenced for 60 days and three of probation, he was sentenced  
15                  to a year, after violating the probation, he had a domestic  
16                  violence charge, he violated the order of protection in that  
17                  domestic violence case, he's used an alias, has a history of  
18                  failing to appear in court, has violated prior -- I'm reading  
19                  now from actually the opinion by the magistrate judge.

20                  So it's a very different situation. We think Harcevic is  
21                  a far more -- is far more cognate for this in terms of where  
22                  the bail statute ought to come out.

23                  **THE COURT:** Okay.

24                  **MR. DRATEL:** Thank you.

25                  **THE COURT:** All right. So we're going to take a short

1           recess and we'll be back in ten minutes. Okay?

2           **MR. DRATEL:** Thank you.

3           **MS. KELLY:** Thank you, Your Honor.

4           (Recess from 2:48 P.M. to 2:57 P.M.)

5           **THE CLERK:** We are back on the record in the matter of  
6           United States versus Adam Shafi. 15 CR 582.

7           **UNIDENTIFIED MALE SPEAKER:** If I could have just one  
8           minute. Let me find Mr. --

9           **THE COURT:** That's no problem. Okay.

10           (Brief pause.)

11           **THE COURT:** We're back on the record in the matter of  
12           Adam Shafi. And this is Case No. 15-cr-00582-WHO.

13           And thank you for being patient with me. I did go back  
14           and think very seriously about, you know, whether or not I  
15           could impose any conditions that would mitigate the risk of  
16           flight and also danger to the community. And I've come to the  
17           conclusion that I cannot. I think the risk of flight is  
18           actually what I'm most concerned about. And one of the reasons  
19           is that there are other individuals who have been talking to  
20           Mr. Shafi about also going to the Middle East and joining ANF,  
21           and I don't have any control over those people, I don't know  
22           who they are, I don't have a way of making sure they're not  
23           working with him, once he is released, to have him leave the  
24           country.

25           And I know there are some mitigating factors that can be

1       put into case, and he has a loving family who is doing  
2       everything they can, and I'm very sorry for them because I know  
3       that they're trying very hard.

4           But I think in this situation, given the unknowns, it is  
5       too difficult. I can't impose conditions that would mitigate  
6       the flight of risk. And because this is a presumption case, I  
7       think that the defendant, you know, the government has shown  
8       there was a risk of flight and that I don't believe there are  
9       any conditions that can be placed to reduce that.

10          And so Ms. Kelly, can you prepare a proposed order for  
11       me?

12           **MS. KELLY:** I will, Your Honor.

13           **THE COURT:** All right. Thank you. And do we need to set  
14       a date before the district judge, Wanda?

15           **MS. KELLY:** We do, Your Honor.

16           **THE CLERK:** I believe so, yes.

17           **THE COURT:** This is in front of Judge Orrick?

18           **THE CLERK:** It's Judge Orrick.

19           **MR. DRATEL:** Yes.

20           **MS. KELLY:** Your Honor, the parties spoke before court  
21       and I know that Mr. Dratel, who is -- comes in for New York for  
22       these appearances, has asked -- and the government has no  
23       objection -- to, if the Court -- if Judge Orrick's calendar is  
24       available, January 14th.

25           And we also agree that there is a basis for exclusion of

1 time for whatever period of time for effective preparation of  
2 counsel.

3 **THE COURT:** Okay. Why don't you fill out the paperwork  
4 also, then.

5 **MS. KELLY:** We have done that, Your Honor.

6 **THE CLERK:** Yes. January 14th at 1:30.

7 **MS. KELLY:** I'll just enter that date, Your Honor, and  
8 then ask -- or Mr. Dratel has already (indiscernible.)

9 **THE COURT:** Signed it. Okay. Thank you.

10 And I will also tell you, Mr. Dratel, that if you were  
11 concerned about your inability to get access to your client or  
12 inability for him to review legal papers, you can bring that  
13 issue before me, I'll discuss it with the US Marshal and make  
14 sure that he gets additional -- gets the right assistance.

15 But I want to assure you he is not in solitary  
16 confinement. Administrative segregation is very different from  
17 solitary confinement. I'm familiar with the issues regarding  
18 solitary confinement and I agree that long term solitary  
19 confinement is not good for people's mental health, although it  
20 may be necessary in some circumstances. But that's not what  
21 Mr. Shafi is placed in right now.

22 So I just want to make sure that you have a clear  
23 understanding of that because I understand you're not from this  
24 area and you don't know the Glenn Dyer facility.

25 **MR. DRATEL:** Yes. Thank you, Your Honor.

1                   **THE COURT:** Okay. Thank you.

2                   **MS. KELLY:** Thank you, Your Honor.

3                   **THE CLERK:** All right. Court is in recess.

4                   **THE MARSHAL:** Remanded?

5                   **THE CLERK:** Yes.

6                   **THE COURT:** The defendant is remanded to the custody of

7                   the US Marshal.

8                   (Proceedings adjourned at 3:01 P.M.)

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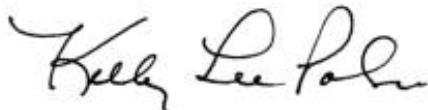
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CERTIFICATE OF CONTRACT TRANSCRIBER

I, Kelly Polvi, CSR, RMR, FCRR, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further, that I am not financially nor otherwise interested in the outcome of the action.

Dated December 24, 2015.



Kelly Polvi, CSR #6389, RMR, FCRR  
Contract Transcriber

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